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No. 93-1188

In the Supreme Court of the United States

OCTOBER TERM, 1993

ROGER WOOLSEY, PETITIONER

v.

NATIONAL TRANSPORTATION SAFETY BOARD AND FEDERAL AVIATION ADMINISTRATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

DREW S. DAYS, III
Solicitor General

FRANK W. HUNGER
Assistant Attorney General

ROBERT S. GREENSPAN
SANDRA WIEN SIMON
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 514-2217

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QUESTION PRESENTED

Whether the National Transportation Safety Board erred in finding that petitioner's company was conducting "common carriage" on the flights at issue.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-32a) is reported at 993 F.2d 516. The orders of the National Transportation Safety Board (Pet. App. 35a-46a) and the Administrative Law Judge (Pet. App. 47a-55a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 23, 1993. A petition for rehearing was denied on August 18, 1993. Pet. App. 33a-34a. On October 20, 1993, Justice Scalia extended the time for filing a petition for a writ of certiorari to and including January 18, 1994. The petition for a writ of certiorari

was filed on January 18, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is president of Prestige Touring, Inc. (PTI), a small air carrier that specializes in transporting musicians. Pet. App. 2a. PTI marketed itself primarily to rock musicians and had at least twenty-five such contracts in 1990. There is no evidence that PTI ever turned away anyone in the music industry who applied to it for air transportation and was willing to pay its fee. *Id.* at 3a. In 1989, petitioner decided to seek business with the country music industry, and he sent Reba McEntire's manager information about PTI's services. *Ibid.*

Shortly thereafter, PTI negotiated an agreement with Reba's Business, Inc., pursuant to which PTI agreed to transport Ms. McEntire and her music group for a fee for a minimum number of hours of flight time per year. PTI also agreed to provide a specific aircraft for the exclusive use of Ms. McEntire and her group, and painted her name and her son's name on the plane. Ms. McEntire and her guests were permitted to leave personal belongings on the plane at all times. In addition, PTI agreed to make the flights from the airport in Gallatin, Tennessee, which was a convenient location for Ms. McEntire. PTI rented an apartment in Gallatin, Tennessee, so that a flight crew would be available on short notice. Pet. App. 4a-5a. Reba's Business, Inc., ceased doing business with PTI when an airplane for which Reba's Business had contracted crashed in March 1991. *Id.* at 5a.

2. On July 5, 1991, the Federal Aviation Administration (FAA) issued an emergency order alleging a number of regulatory violations in connection with PTI's service to Reba's Business and revoking petitioner's commercial pilot certification. Petitioner was alleged to have served as the pilot in command on fifty-three flights for compensation for Reba's Business without meeting the training and examination requirements for pilots operating aircraft for a common carrier under the Federal Aviation Regulations, 14 C.F.R. Pt. 135. Petitioner defended on the ground that the aircraft involved were not operated in "common carriage," and that, accordingly, the less stringent safety requirements of 14 C.F.R. Pt. 91, should have been applied by the National Transportation Safety Board (NTSB). Pet. App. 2a, 5a.

An administrative law judge (ALJ) orally affirmed the decision of the FAA Administrator. The NTSB affirmed the ALJ's decision with respect to the revocation of petitioner's license. The NTSB concluded that revocation of petitioner's license was appropriate "where, as here, respondent operated as pilot in command of 53 flights with paying passengers, to whom he owed a high standard of care, and when he did not have the necessary training, examinations and check rides required of him under [14 C.F.R.] Part 135 [which applies to common carriers]." Pet. App. 42a. In finding that PTI operated as a common carrier, the NTSB relied on the definition of that term provided in FAA Advisory Circular No. 120-12A (Apr. 24, 1986) (*reproduced at* Pet. App. 56a-60a). Pet. App. 41a-42a. That Advisory Circular provides that "[t]here are four elements in defining a common

carrier[:] (1) a holding out of a willingness to (2) transport persons or property (3) from place to place (4) for compensation. This 'holding out' which makes a person a common carrier can be done in many ways and it does not matter how it is done." *Id.* at 57a.

3. The court of appeals affirmed. Pet. App. 1a-32a. The court held that the NTSB correctly interpreted the term "common carrier" as applied to air carriers, and it accordingly rejected petitioner's claim that PTI was not subject to the safety requirements of 14 C.F.R. Pt. 135. Pet. App. 2a. The court noted that the term "common carrier" is not defined in the Federal Aviation Act or in the Federal Aviation Regulations, and noted that it must look to other sources, most notably the common law relating to air carriers, to determine whether PTI was a common carrier with respect to the flights in question. *Id.* at 14a-15a. The court relied for guidance on Advisory Circular No. 120-12A, finding that "the definition of common carrier provided therein is in relevant respect the same as that found at common law," and that the Advisory Circular "does not seek to broaden the definition of common carriage." Pet. App. 17a.

The court rejected petitioner's claim that PTI did not meet the common-law definition of "common carrier" because PTI allegedly furnished air transportation selectively and any "holding out" was no more than an invitation to negotiate contracts on a case-by-case basis. Pet. App. 15a-16a. The court explained that, consistent with the Advisory Circular, the "crucial determination in assessing the status of a carrier is whether the carrier has held itself out to the public or to a definable *segment* of the public as being willing to transport for hire, indiscriminately."

Id. at 18a (citing, *inter alia*, *Las Vegas Hacienda, Inc.* v. *CAB*, 298 F.2d 430 (9th Cir.), cert. denied, 369 U.S. 885 (1962)). Based on that definition, the court concluded that there was substantial evidence on which the ALJ and NTSB could conclude that PTI had held itself out as being willing to serve all members of the music industry who were able to pay for its services, and that "[o]n these facts alone, the NTSB was justified in concluding that PTI acted as a common carrier." Pet. App. 20a-21a.

The court also rejected petitioner's related claim that PTI is not a common carrier because PTI does not utilize uniform tariffs. The court agreed with the FAA that the absence of uniform tariffs does not alone suffice to make the carrier a private carrier, and noted that "[w]hat is crucial is that the common carrier defines itself through its own marketing efforts as being willing to carry any member of that segment of the public which it serves." Pet. App. 21a-22a. Thus, even if petitioner subjectively intended to bring his operations under the less restrictive provisions of 14 C.F.R. Pt. 91, it is "the objective conduct of himself and his corporation which bring their actions under [14 C.F.R.] Part 135." Pet. App. 24a.

Judge DeMoss dissented. In his view, the FAA's failure to define the term "common carriage" or "common carrier" through a formal rulemaking presents a "serious due process problem," because it can lead to the revocation of a pilot's license based on "an administrative agency's ad hoc definition of a critical term." Pet. App. 25a. Judge DeMoss also concluded that the meaning that the FAA gives to the term "common carriage" is inconsistent with the statute, because it makes the statutory distinction

between "air carrier" and "commercial operator" turn solely on the element of "holding out" to prospective customers, which is an element that is always present in commercial relationships. *Id.* at 27a. That result is anomalous because "[s]urely there is some Constitutional right to free speech for business which would encompass making known to prospective customers the availability of your services." *Id.* at 27a-28a.

ARGUMENT

1. Petitioner renews his contention that 14 C.F.R. Pt. 135 does not apply to the subject flights, because PTI was not engaged in "common carriage" as that concept was understood by the common law. According to petitioner, the common law understood a common carrier to be "one who holds out a willingness to carry, at a fixed rate, all persons applying for air transport, so long as there is room in the aircraft." Pet. 8. He contends that the "fixed rate or tariff is the linchpin of the requirement that a common carrier serve its customers 'indiscriminately.'" *Ibid.* Petitioner's claim warrants no further review.

The court of appeals correctly concluded that the definition of common carriage in FAA Advisory Circular No. 120-12A (Apr. 24, 1986) "is in relevant respect the same as that found at common law," Pet. App. 17a, and that under both the common law and the Advisory Circular the "crucial determination in assessing the status of a carrier is whether the carrier has held itself out to the public or to a definable *segment* of the public as being willing to transport for hire, indiscriminately." *Id.* at 18a-19a.

That focus on a willingness to serve the relevant market segment "indiscriminately" is consistent with a number of cases holding that the "dominant factor in fixing common carrier status at common law is the presence of a 'holding out.'" *Las Vegas Hacienda, Inc.* v. *CAB*, 298 F.2d 430, 434 (9th Cir.) (citing cases), cert. denied, 369 U.S. 885 (1962). The test is an objective one, relying upon what the carrier actually does rather than the label that the carrier attaches to its activities, or the purpose behind those activities. *Id.* at 434. The guidelines set forth in the Advisory Circular are amply supported by the aviation-related case law, and merely state succinctly what may be gathered from those cases. See, *e.g.*, *East Coast Flying Service, Enforcement Proceeding*, 46 C.A.B. 640, 642-644 (1967), and cases cited therein.

While petitioner appears to agree that the court of appeals correctly held that the common law required "indiscriminate service," he contends (Pet. 8-10) that the court erred in failing to recognize that the essence of indiscriminate service is the use of a fixed rate or tariff. Petitioner's contention is erroneous. Consistent with the common sense understanding of the phrase, "indiscriminate service" merely connotes a willingness to serve all those members of the relevant market who are willing to pay the price demanded, without the exercise of selectivity within that market. Thus, the FAA's Advisory Circular is correct in stating that the "[a]bsence of tariffs or rate schedules, transportation only pursuant to separately negotiated contracts, or occasional refusals to transport, are not conclusive proof that the carrier is not a common carrier." Pet. App. 57a; see also *Las Vegas Hacienda*, 298 F.2d at 434 (existence of a

contract negotiated for a special price does not alone suffice to make the carrier a private carrier); *Southeast Airlines, Enforcement Proceeding*, 32 C.A.B. 1281, 1284-1285 (1961) ("the test of common carriage is the nature of the holding out to the public, not the uniformity of the rates charged the public").

The NTSB correctly concluded that PTI was a common carrier under the appropriate test. There is ample evidence in the record that PTI had "held itself out as being willing to serve all members of the music industry who were able to pay for its services." Pet. App. 21a. There is no evidence that PTI ever turned away any member of the music industry who could pay PTI's fees. Based on those facts, the NTSB was justified in concluding that PTI acted as a common carrier and was subject to the Federal Aviation Regulations, 14 C.F.R. Pt. 135.[1]

2. There is no merit to petitioner's contention that the court of appeals' decision, by failing to require proof that PTI always used a fixed rate or tariff, conflicts with a number of decisions of this Court and of other courts of appeals that have adverted to that factor. As recognized by the court of appeals, "[m]ost of these cases involve definitions of common carriage developed outside the context of aviation law." Pet. App. 19a. See *Louisville & N.R.R.* v. *United States*,

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[1] Petitioner also contends that the "record in this matter also demonstrates the clear violation of all operators' First Amendment commercial speech rights by enforcement of the FAA definition." Pet. 10-11. The FAA's definition does not forbid petitioner from engaging in any speech; it merely requires PTI's crews to possess a particular level of training and applies higher safety standards to many facets of the operation.

282 U.S. 740 (1931) (railroads); *Terminal Taxicab Co.* v. *Kutz*, 241 U.S. 252 (1916) (taxicabs); *Semon* v. *Royal Indemnity Co.*, 279 F.2d 737 (5th Cir. 1960) (fishing boats); *Home Insurance Co.* v. *Riddell*, 252 F.2d 1 (5th Cir. 1958) (trucks). The court of appeals correctly recognized that the most important source of law in this case is the common law "relating to air carriers" (Pet. App. 14a), which is consistent with the guidelines in the FAA's Advisory Circular. Petitioner makes no serious claim that the decision below conflicts with any case addressing the issue in the aviation context.[2]

3. Petitioner also claims (Pet. 12-13) that the FAA should have adopted its definition of "common carriage" through the rulemaking process of the Administrative Procedure Act (APA), 5 U.S.C. 553, because the Advisory Circular's definition of "common carriage" supersedes the long-standing common-law definition. As the court of appeals correctly recognized (Pet. App. 17a), the premise of that contention is wrong, because "the definition of common carrier provided [in the Advisory Circular] is in relevant respect the same as that found at common law." The court's conclusion is confirmed by the

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[2] Petitioner's reliance (Pet. 8) on *Jackson* v. *Stancil*, 116 S.E.2d 817 (N.C. 1960), is misplaced. As the court of appeals noted in this case, the North Carolina Supreme Court in fact applied a "multivariate" test for common carriage, in which the dispositive factor was not whether the carrier charged uniform rates or agreed to carry all passengers for whom its aircraft had room, but whether the carrier "held itself out to the public as being available for service." Pet. App. 18a n.21 (emphasis omitted) (citing *Jackson* v. *Stancil*, 116 S.E.2d at 824).

Advisory Circular itself, which notes that " '[c]ommon carriage' and 'private carriage' are common law terms," and that the circular merely provides guidelines as to their meaning. *Id.* at 57a. This Court has repeatedly recognized that administrative agencies may publish such enforcement guidelines, and that those informal guidelines, while "not entitled to the same deference as norms that derive" from formal rulemaking pursuant to delegated powers, "are still entitled to some weight on judicial review." *Martin* v. *OSHRC*, 499 U.S. 144, 157 (1991).[3]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

FRANK W. HUNGER
Assistant Attorney General

ROBERT S. GREENSPAN
SANDRA WIEN SIMON
Attorneys

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[3] Petitioner does not claim prejudice from any lack of notice of the Advisory Circular. Indeed, the court of appeals found that petitioner "was aware of the definition of 'common carriage' provided by the FAA in its Advisory Circular." Pet. App. 15a.